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NO. 86-1651

In the Supreme Court of the United States

OCTOBER TERM, 1986

EUGENE SHEDRICK,
Petitioner/Appellant,

VS.

DOROTHY D. DONNELLY, ET AL,
Defendants/Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether due process guarantees an employee the right to counsel at a pretermination hearing?

PARTIES

Eugene Shedrick

Dorothy D. Donnelly

Jefferson Parish School Board

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STATEMENT OF THE CASE

On December 18, 1985, Dorothy Donnelly, Principal of Riverdale High School, wrote a memorandum to Sidney Montet, Director of Personnel for the Jefferson Parish School Board, recommending the termination of Eugene Shedrick, a teacher at Riverdale High School.

On January 7, 1986, Mrs. Donnelly amended her recommendation of termination to include suspension without pay effective January 8, 1986.

On January 8, 1986, Anthony Chimento, Superintendent of the Jefferson Parish School Board, notified Eugene Shedrick that he was being suspended without pay effective immediately and furthermore that he was recommending that he be terminated as a teacher with the Jefferson Parish School Board.

On January 9, 1986, Mr. Shedrick filed a complaint in the United States District Court against Dorothy Donnelly seeking damages and an injunction, prohibiting Mrs. Donnelly from disciplining him and from terminating him. On January 21, 1986, Mr. Shedrick filed an amended complaint asking for damages, an injunction and a temporary restraining order. Also at this time, Mr. Shedrick added the Jefferson Parish School Board as a party defendant. A hearing was held on this motion on January 22, 1986, at which time the motion for temporary restraining order and preliminary injunction were denied.

On January 22, 1986, Mr. Shedrick met with Sidney Montet, representatives of the personnel department, Dorothy Donnelly, and representatives of the Jefferson

Federation of Teachers, pursuant to a collective bargaining agreement in effect between the Jefferson Parish School Board and the Jefferson Federation of Teachers. At that meeting, Mr. Shedrick was informed of the charges made by Mrs. Donnelly and was given an opportunity to respond and present his side.

On January 23, 1986, Mr. Montet advised Mr. Shedrick that he was upholding the recommendation of Mrs. Donnelly and therefore recommended to the superintendent that he be terminated and suspended without pay effective January 8, 1986.

On January 28, 1986, Mr. Chimento advised Mr. Shedrick that he was upholding the recommendation of both Mr. Montet and Mrs. Donnelly and was going to notify the members of the Jefferson Parish School Board of his recommendation to terminate and suspend without pay pending a hearing before the Board in accordance with LSA-R.S. 17:433. That statute provides in part that:

> "A permanent teacher shall not be removed from office except upon written and signed charges of willful neglect of duty, or incompetency or dishonesty, or of being a member of or contributing to any group, organization, movement or corporation that is by law or injunction prohibited from operating in the state of Louisiana, and then only if found guilty after a hearing by the school board of the parish or city, as the case may be, which hearing may be private or public, at the option of the teacher. At least twenty days in advance of the date of the hearing, the superintendant with approval of the school board shall furnish the teacher with a copy of the written charges. Such statement of charges shall include a complete and detailed list of the specific

> reasons for such charges and shall include but not limited to the following: date and place of alleged offense or offenses, names of individuals involved in or witnessing such offense or offenses, names of witnesses called or to be called to testify against the teacher at said hearing, and whether or not any such charges previously have been brought against the teacher. The teacher shall have the right to appear before the board with witnesses in his behalf and with counsel of his selection, all of whom shall be heard by the board at said hearing. For the purpose of conducting hearings hereunder the board shall have the power to issue subpoenas to compel the attendance of all witnesses on behalf of the teacher. Nothing herein contained shall impair the right of appeal to a court of competent jurisdiction."

Subsequent to this, Mr. Shedrick requested a formal hearing before the board. These hearings were scheduled for February 26, 1986, February 27, 1986, March 3, 1986, March 24, 1986, March 25, 1986, April 15, 1986, May 22, 1986, and June 23, 1986. Of these scheduled hearings, only those scheduled for February 27, 1986, May 22, 1986, and June 23, 1986 were actually held. At least one of the cancelled hearings was at the request of Mr. Shedrick's attorney.

On June 13, 1986, Mr. Shedrick filed a second amended complaint seeking damages, an injunction and also a temporary restraining order, due to the fact that the Jefferson Parish School Board had not included his tenure hearing in what he felt to be a timely manner.

On June 23, 1986, the board voted to uphold the superintendent's recommendation of termination effective January 8, 1986.

The trial court ruled on July 16, 1986 that Mr. Shedrick received a constitutionally acceptable pretermination hearing and that the limited delay in conducting the tenure hearing before the board was not unreasonable nor was it inconstitutional per se. It had been conceeded by Mr. Shedrick's attorney that the claim for damages was pre mature at this time and therefore, the only issues before the court were the manner in which the pretermination hearing was conducted and the timeliness of the tenure hearings.

On July 22, 1986, Mr. Shedrick filed a motion for a new trial alleging that the pretermination hearing was unconstitutional since he was prohibited from having an attorney present with him. The collective bargaining agreement between the Jefferson Federation of Teachers, of which Mr. Shedrick was a member, and the Jefferson Parish School Board did not allow for an attorney to be present at a disciplinary hearing or at a pretermination hearing.

On August 15, 1986, trial judge ruled that legal representation at the pretermination hearing is not a part of the process to which an employee is due. The court also ruled that the hearings were conducted timely.

SUMMARY OF ARGUMENT

Mr. Shedrick, the complainant-appellant, argues that his due process rights were violated when he was prohibited from having counsel present at his pretermination hearing.

Due process requires that the individual effected

must be given some kind of notice and afforded some kind of hearing.

Prior to his meeting with Sidney Montet, Director of Personnel, Mr. Shedrick was furnished with a copy of the written changes against him.

On January 22, 1986, Mr. Montet held a conference with Mr. Shedrick, Mrs. Donnelly, representative of the personnel department and a representative of the Jefferson Federation of Teachers. At that time, Mr. Montet read each charge and asked Mrs. Donnelly to substantiate them. After doing so, Mr. Shedrick was given the opportunity to present his side of the story and submit any documentation that he desired. During the conference, Mr. Shedrick was allowed to question Mrs. Donnelly. At the conclusion of the conference, which lasted approximately three hours, both Mr. Shedrick and the union representative made closing statements. Additionally, Mr. Shedrick was advised that if he so desired he could present rebuttal evidence.

The Jefferson Parish School Board contends that Mr. Shedrick's pretermination due process rights were satisfied upon giving notice of the charges against him and giving him an opportunity to present his side of the story.

ARGUMENT

Eugene Shedrick, was suspended without pay on January 8, 1986. On January 22, 1986, a "pretermination" was held. Subsequent to that, in accordance with the provisions of LSA-R.S. 17:443, a tenure hearing was conducted before members of the Jefferson Parish School Board.

After his pretermination hearing but prior to the hearing before the board, in accordance with LSA-R,S, 17:443, Mr. Shedrick was again advised of the reasons for termination, given copies of all documentary evidence to be introduced in support of those charges and furnished with a list of all witnesses who would be called to testify against him.

At the board hearing, Mr. Shedrick was represented by counsel, had the opportunity to cross examine the witnesses against him, had the opportunity to introduce rebuttal evidence and had the opportunity to testify in his own behalf.

Mr. Shedrick is not alleging that the tenure hearing violated his due process. His main complaint is that his due process rights were violated at the pre termination hearing because he was prohibited from having an attorney present.

The facts in this case are similar to those in *Cleveland Board of Education v. Loudermill,* 105 S.Ct. 1487 (1985). In that case, both employees were allowed a pre termination hearing, a full administrative hearing and judicial review.

In discussing the pre termination hearing, the court in Loudermill stated that,

> "The foregoing considerations indicate that the pre termination "hearing," though necessary, need not be elaborate. We have pointed out that "the formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the

subsequent proceedings." *Boddie v. Connecticut,* 401 U.S., at 378, 91 S.Ct., at 786. See *Cafeteria Workers v. McElroy,* 367 U.S. 886, 894-895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). In general, "something less" than full evidentiary hearing is sufficient prior to adverse administrative action. *Mathews v. Eldridge,* 424, U.S., at 343, 96 S.Ct., at 907. Under state law, respondents were later entitled to a full administrative hearing and judicial review. The only question is what steps were required before the termination took effect.

In only one case, *Goldberg v. Kelly,* 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), has the Court required a full adversarial evidentiary hearing prior to adverse governmental action. However, as the Goldberg Court itself pointed out, see id., at 264, 90 S.Ct., at 1018, that case presented significantly different considerations than are present in the context of public employment. Here, the pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions - essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. See *Bell v. Burson,* 402 U.S., at 540, 91 S.Ct., at 1590.

The essential requirements of due process, and all that respondents seek or the Court of Appeals required, are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. See *Friendly, "Some Kind of Hearing",* 123 U.Pa.L.Rev. 1267, 1281 (1975). The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to

present his side of the story. See *Arnett v. Kennedy*, 416 U.S., at 170-171, 94 S.Ct., at 1652-1653 (opinion of POWELL, J.); id., at 195-196, 94 S.Ct., at 1664-1665 (opinion of WHITE, J.); See also *Goss v. Lopez*, 419 U.S., at 581, 95 S.Ct., at 740. To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.

In the case of *Riggins v. Board of Regents of University of Nebraska*, 790 F.2d 707 (8th Cir. 1986), RIggins was discharged as a custodial worker by the University of Nebraska. Prior to her termination, Ms. Riggins had a meeting with her supervisor concerning the incident that had led to her termination recommendation. At that meeting he advised her of the charges against her and gave her an opportunity to respond. Several days after this "pre termination hearing" Ms. Riggins was terminated.

Had Ms. Riggins decided to proceed, the University had a grievance procedure which could have been followed. There were three steps in the procedure. In the final step, a grievance committee composed of members from the three major types of staff considers evidence from both sides. Grievants are allowed to have lawyers, to look at all material in their personnel files, and to present witnesses in their own behalf.

The court in Riggins, citing *King v. University of Minnesota*, 774 F.2d 224, 228 (8th Cir. 1985) (quoting *Brouillette v. Board of Directors of Merged Area IX*, 519 F.2d 126, 128 (8th Cir. 1975), cert. denied, - U.S. -, 106 S.Ct. 1491, 89 L.Ed.2d 893 (1986), listed four requirements of due process, not including the opportunity to cross

examine or confront witnesses, in the discharge of tenured professor from a state university:

> "1) clear and actual notice of the reasons for termination in sufficient detail to enable him or her to present evidence relating to them;
>
> 2) notice of both the names of those who have made allegations against the teacher and the specific nature and factural basis for the charges;
>
> 3) a reasonable time and opportunity to present testimony in his or her own defense; and
>
> 4) a hearing before an impartial board or tribunal".

The court went on to say that, "If appellant (Riggins) had availed herself of the University's grievances procedure, she would have had all the protection listed in King and a fair opportunity to be heard. Due process in this context does not require more."

Mr. Shedrick was afforded every opportunity listed in both Riggins and King and now claims that one more requirement should be added, the right to counsel.

To justify this claim, he cites the case of *Potashnick v. Port City Construction Co.*, 609 F.2d 1101 (5th Cir. 1980). In that case the trial judge had instructed the parties that once a witness took the stand, he was precluded from conferring with his attorney. The court held that, "the judge's rule pertaining to attorney-client communication impringed on Port City's due process right to retain counsel."

The main difference between Potashnick and the case at bar, is that the witness in Potashnick was denied counsel during the trial. In Mr. Shedrick's case, he was denied counsel at the pre termination hearing only. He was allowed and did not in fact have counsel present at the post termination hearing.

Mr. Shedrick cites *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011 (1970) to support his contention that the right to counsel is present at administrative hearings. However, the facts in this case are quite distinctive from the case at bar.

In Goldberg, welfare recipients were denied assistance of counsel at administrative hearings which determined their eligibility for continued receipt of welfare payments. Additionally, the welfare recipients were not allowed to present their position orally, but rather, were allowed to present their position in writing or secondhand, through their case worker.

The court found that by terminating a welfare recipient's aid pending the resolution of the controversy of eligibility without due process, could deprive an eligible recipient of the very means by which to live while he waits.

The court felt that because of the welfare recipient's lack of education and inability to obtain professional assistance, he should be permitted counsel. In Mr. Shedrick's case, he was able to receive unemployment compensation benefits as well as earn income from other sources.

The due process requirements with respect to pre termination hearings have been defined by Loudermill as notice and as opportunity to respond.

In *Carter v. Western Reserve Psychiatric Habilitation,* 767 F.2d 270 (1985) the court held that "Wade's pre termination hearing was constitutionally sufficient in as much as he had received notice of the charge against him and was afforded an opportunity to rebut that charge.

In *Kelly v. Smith,* 764 F.2d 1412 (1985), the court went so far as to say that "Under Loudermill, it is clear that oral notice and an opportunity to respond orally is sufficient in the pre termination context."

Rogers v. Masem, 788 F.2d 1288 (8th Cir. 1985), relying on Loudermill, stated that "Prior to termination, the School Board was obligated to provide Rogers at a minimum notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.

The Loudermill decision and those following it have said that the requirements necessary at a pretermination hearing are notice and an opportunity to respond. The only case requiring presence of counsel was Goldberg, for reasons discussed previously.

Mr. Shedrick was afforded all of the rights prescribed by law. He had an extensive pretermination hearing where he was able to hear the evidence against him, cross examine the witness, present his side of the story and rebut any unfavorable evidence.

CONCLUSION

It had been argued that the contractual provision between the Jefferson Parish School Board and the teachers, prohibiting counsel at pretermination hearings, should be stricken with nullity.

This Court has defined the requirements of due process, and the right to counsel does not appeal therein.

The fact that the union contract prohibited the right to counsel in a pretermination hearing is of no consequence, provided due process rights are satisfied.

In the instant case, all of the requirements of pretermination due process were met.

Therefore, it is submitted that the decision of the appellate court is correct and the writ should not be grnated.

RESPECTFULLY SUBMITTED:

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing brief has been served upon:

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by depositing same in the United States mail, postage prepaid, this 13th day of May, 1987.

_____

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